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No. 73-264

IN THE

# Supreme Court of the United States

OCTOBER TERM 1973

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AND ITS LOCAL NO. 171,
*Petitioners,*

v.

SAM KANE PACKING CO., SAM KANE WHOLESALE MEAT, INC., AND SAM KANE MEAT, INC.,
*Respondents.*

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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### OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is officially reported at 477 F.2d 1128.

The opinion of the United States District Court for the Southern District of Texas is not yet officially reported and is attached to the Petition for a Writ of Certiorari as Appendix "C".

### QUESTION PRESENTED

Whether or not, under the facts and circumstances of the case, the Union is entitled to enforcement of a unilateral, ex parte arbitration award under Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185.

## STATEMENT OF THE CASE

Respondents would respectfully refer this Honorable Court to the opinion of the United States Court of Appeals for the Fifth Circuit (477 F.2d 1128, Appendix "B" to the Petition for a Writ of Certiorari) for a more accurate and full statement of the facts of the case, especially footnote 1, 477 F.2d 1128, 1130 n. 1 and the Court's Opinion at 477 F.2d 1128, 1131-32, which set forth the pertinent contractual provisions.

Respondents (hereinafter referred to as the "Company") believe that some additional amplification as to the nature of the case is necessary. First, the Petitioners' (hereinafter called "Union") consistent position after the dispute arose was that the Company had engaged in a "lockout" of the employees, and the Company's position was that it had not locked out the employees but that the employees had engaged in an improper work stoppage and engaged in acts of violence and intimidation.[1] The Union sought to invoke the grievance and arbitration provisions of the contract over the Company's alleged lockout, and the Company denied that a lockout was an arbitrable matter under the parties' collective bargaining agreement.[2] The Company, while denying that the alleged lockout was an arbitrable matter under the contract, clearly advised the Union, *before* it undertook its unilateral, ex parte proceeding, that in the event the matter was found to be arbitrable the Company appointed its Secretary and General Counsel, Harold Alberts, as the Company's Arbitrator[3] (477 F.2d 1128, 1131.).

Thus, the Union was contending that the Company had locked out the employees and was seeking to arbitrate the

[1] Joint Appendix, Court of Appeals, 88-92, 108-109, 110-111.
[2] Joint Appendix, Court of Appeals, 100-101, 104-105, 108-109, 110-111.
[3] Joint Appendix, Court of Appeals, 112-114, 121, 122.

alleged lockout, and the Company was contending it had not locked out the employees and that the issue of lockout was not an arbitrable matter under the parties' collective bargaining agreement.[4] Despite the controversy over the arbitrability of the matter, the Union designated its Arbitrator, and the Company designated its Arbitrator in the event there was an arbitrable matter to be heard. When the Union announced its intention to proceed unilaterally, the Company filed suit in the United States District Court for the Southern District of Texas, Corpus Christi Division, seeking to enjoin the unilateral, ex parte hearing and secured a temporary restraining order from the District Court.[5] The Company also sought a declaratory judgment from the District Court as to whether or not the matter was arbitrable under the parties' agreement.[6] After hearing, the District Court dissolved the temporary restraining order, but did not pass upon the Company's request for a declaratory judgment as to arbitrability, and the Union again announced its intentions to proceed unilaterally; the Company reiterated that Alberts was the Company's Arbitrator in the event the matter was arbitrable and that the question of arbitrability was pending before the District Court.[7] After the Union's appointed Arbitrator had issued his ex parte, unilateral award, the Union filed a supplemental petition and counterclaim seeking to enforce the unilateral award, and the Company answered denying the validity of the award and contesting the propriety of the arbitration proceeding.[8]

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[4] Both lockouts and strikes and work stoppages were expressly excluded from arbitration under the exclusionary clause of Article V, Section 1, of the parties' collective bargaining agreement quoted in the Opinion of the Court of Appeals at 477 F.2d 1128, 1131.

[5] Joint Appendix, Court of Appeals, 2, 4-6.

[6] *Id.* at 7-10.

[7] *Id.* at 127-131, 156-157, 161.

[8] *Id.* at 21-27.

As found by the Court of Appeals in its Opinion, it is clear that the Company informed the Union prior to the Union's undertaking of its unilateral arbitration proceeding, that it did not believe the matter arbitrable and if it was arbitrable then the Company's Arbitrator was Alberts. "Both the union attorney, Mr. Herrera, and the union representative, Senator Bernal, were clearly informed of this position in advance of the scheduled hearing date" (477 F.2d at 1131.). The District Court had construed the contract provisions in such a way as to exclude lockouts from the exclusionary language of Article V, but, as found by the Fifth Circuit, neither the Union nor the Company agreed with this construction of the contract, and the Union does not attack this portion of the Opinion of the Fifth Circuit in its Petition for a Writ of Certiorari (477 F.2d at 1132.). The Court of Appeals in finding the underlying dispute between the parties arbitrable disregarded the Union's characterization of the dispute as a lockout and determined that the real issue which the Union sought to arbitrate was whether or not the Company had any justification in replacing and discharging the employees who ceased work (477 F.2d at 1132-33.). Having thus decided the question of arbitrability, the Court of Appeals then discussed the effect of the unilateral award of the Union's Arbitrator against this background. As the Court of Appeals noted, each party had appointed their Arbitrators, and the two party-appointed Arbitrators were in basic disagreement over the threshold issue of arbitrability (477 F.2d at 1135.). Having concluded that the Company had appointed its Arbitrator, the Court found that the narrow exception contained in the parties' contract allowing unilateral proceedings was no longer applicable and that the Union should have sought an Order from the District Court

compelling the Company to arbitrate,[9] and the Company should have sought a prohibition of the one-sided arbitration as well as seeking a determination of the arbitrable nature of the dispute.[10]

The assertions advanced by the Union in its Petition for a Writ of Certiorari (pp. 6-8) in attacking the Opinion of the Court below were not raised in the Court below. There is no evidence whatsoever in the Record to support the Union's concept of the contractual provisions as advanced in its Petition for a Writ of Certiorari.

## REASONS FOR DENYING THE WRIT

### I.

### UNDER THE UNIFORM DECISIONS OF THIS COURT THE QUESTION OF ARBITRABILITY IS FOR THE COURTS.

In this case, the parties were in dispute as to whether or not the matter was arbitrable and it was the Company who sought by declaratory judgment action to have the appropriate forum, the Court, determine the question of arbitrability before undertaking to arbitrate. This was clearly its right under the decisions of this Court. *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241-242 (1962); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 547 (1964). *Accord: Mogge* v. *District No. 8, IAM*, 387 F.2d 880, 882

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[9] The Court also suggested that the Union should have, in accordance with the contract procedures, requested a panel of neutral arbitrators from Federal Mediation & Conciliation, 477 F.2d at 1136 n. 3.

[10] 477 F.2d at 1136 n. 5. The Company would point out that this is exactly what it had sought to do in seeking to restrain the ex parte, unilateral proceeding by the Union's Arbitrator pending a determination of the issue of arbitrability under its Amended Complaint (Joint Appendix, Court of Appeals, 4-5, 7-10).

(7th Cir. 1968), *cert denied,* 391 U.S. 936. As stated by this Court in *Wiley,* 376 U.S. at 547:

> "'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties. . . . The duty to arbitrate being of contractual origin, *a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.*" (Emphasis added.)

## II.

## THE COMPANY COMPLIED WITH THE CONTRACTUAL OBLIGATIONS.

Upon the Union's invocation of the grievance and arbitration provisions of the parties' contract, the Company contested arbitrability. Nevertheless, when the Union designated its Arbitrator, the Company complied with the contractual provisions and designated its Arbitrator as well. Both Arbitrators having been designated, the Company consistently advised the Union and its Arbitrator, prior to the commencement by the Union of its unilateral, ex parte proceeding, that the Company had appointed its Arbitrator and did not believe the matter was arbitrable. The Union further knew prior to instituting its unilateral, ex parte proceeding that the Company was seeking to have the appropriate forum, the Court, determine the question of arbitrability. Rather than follow the common practice, as suggested by the Fifth Circuit in its Opinion, of seeking to have the Court compel the Company to arbitrate, or, as the Fifth Circuit also suggested, sending off for a panel of neutral arbitrators from Federal Mediation & Conciliation Service as the contract specified, the Union undertook to proceed unilaterally. The Company's action here not only

complied with the parties' collective bargaining agreement but was also consistent with the decisions of other Courts of Appeal in similar situations. *Mogge* v. *District No. 8, IAM*, 387 F.2d 880, 882 (7th Cir. 1968), *cert. denied*, 391 U.S. 936; and *Food Handlers Local 425* v. *Pluss Poultry, Inc.*, 260 F.2d 835 (8th Cir. 1958) (denying enforcement of an arbitration award entered by an arbitrator designated unilaterally by the union where the company refused to appoint an arbitrator, contending the matter was not arbitrable).

## CONCLUSION

It is clear under the facts of this case that the Company contested the arbitrability of the dispute which the Union characterized as a lockout and sought to submit to arbitration. The Company sought to obtain a judicial determination of arbitrability before agreeing to arbitrate, but, nevertheless, the Company, in accordance with contractual procedures, appointed its Arbitrator in the event the matter was determined to be arbitrable. The Union, ignoring the contractual provisions requiring the request of a panel of arbitrators from the Federal Mediation & Conciliation Service in the event the two appointed Arbitrators could not agree on a third arbitrator, and failing to seek to compel the Company to arbitrate in the District Court, undertook without any authority in the agreement or in the decisions of the courts to proceed unilaterally. Under these circumstances, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

By .....

L. G. Clinton, Jr.
A. J. Harper II
Harold Alberts

## CERTIFICATE OF SERVICE

I, A. J. Harper II, do hereby certify that on this 29th day of August, 1973, a true and correct copy of the foregoing Brief for Respondents in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served on the following by placing same in the United States mail, postage prepaid:

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